SUPREME COURT, U. S.
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In The

Supreme Court of the United States

October Term, A. D., 1970

No. 1173

PEACOCK RECORDS, INC., a Texas Corporation,
and DON D. DOBBY,

Petitioners,

vs.

CHESS RECORDS, INC., an Illinois Corporation,
CHESS RECORD CORPORATION, an Illinois Corporation,
and PHIL CHESS and LEONARD CHESS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

William R. Mims
Sophia H. Hall
128 W. Madison Street
Chicago, Illinois 60602
FRanklin 2-1106

Attorneys for Petitioners

SUPREME LAW PRINTING CO., INCORPORATED, CHICAGO, ILLINOIS

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To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States*:

Petitioners, Peacock Records, Inc., and Don D. Robey respectfully pray that a Writ of Certiorari issue to review the judgment in this case entered by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion entered by the United States Court of Appeals for the Seventh Circuit is reported at 430 F. 2d 88 and is attached hereto as Appendix 1.

JURISDICTION

On February 17, 1969 the District Court for the Northern District of Illinois, Eastern Division, entered judgment for plaintiffs in the foregoing cause. Defendants appealed, and on August 6, 1970 the Court of Appeals of the Seventh Circuit reversed and remanded with directions that a new judge hear the retrial of the cause. Plaintiffs' petition for rehearing was denied September 29, 1970.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in denying plaintiffs a trial by a trial judge by exceeding its scope of appellate review.

   A. Whether the Court of Appeals in the appeal after the first trial improperly limited the trial judge's discretion in deciding a motion pursuant to Rule 60b, by substituting its opinion for that of the trial judge as to the credibility of witnesses.

B. Whether the Court of Appeals in the appeal after the second trial improperly reviewed the legal sufficiency of a section 144 affidavit by going beyond the affidavit to review the record of the first trial and substituting its opinion for that of the trial judge as to the credibility of witnesses and inferences to be drawn from facts.

STATUTORY PROVISION

28 U.S.C.A., Section 144—Bias or prejudice of judge

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

STATEMENT OF FACTS

This was an appeal to the Seventh Circuit Court of Appeals from the judgment of the District Court for the Northern District of Illinois, Eastern Division, in a case arising under 28 U.S.C.A. §1332. Judgment was entered in favor of plaintiffs and against defendants on February 17, 1969. The trial, which was the second trial of this cause, began October 10, 1967 and continued from time to time to August 14, 1968.

Defendants appealed the judgment and the Seventh Circuit Court of Appeals reversed and remanded the case for a new trial before a new judge. The Court found that the trial judge erred in denying defendants' motion to recuse pursuant to section 144 of Title 28 of the United States Code. The affidavit of defendant, Leonard Chess, attached to the motion set forth the statements of the trial judge during the hearing on defendants' motion pursuant to Rule 60b which was filed with leave of the district court during the pendency of the appeal from the judgment in the first trial of this cause. The affidavit contains the trial judge's statements that in his opinion Loyd Woodard, J. T. Clinkscales and Lawrence Abram were not telling the truth in their affidavits filed in the 60b proceedings wherein they alleged that they had lied in the first trial and that this perjury was suborned by plaintiffs. The judge further stated, according to the section 144 affidavit, that it was incredible that these witnesses would voluntarily come forward to admit to perjury and subject themselves to prosecution, and that they were possibly induced to recant their testimony. The affidavit also contains the allegation that

the judge had said he would consider the evidence from the first trial in the second trial.

The Court of Appeals held that the allegations in the affidavit were legally sufficient to show bias and prejudice of the trial judge against the defendants. The Court concluded, from reviewing the evidence contained in the record of the *first* trial, that the trial judge's stated opinions concerning the credibility and motivations of Loyd Woodard, J. T. Clinkscales and Leonard Abram were not supported by evidence in that record. The Court further found that the judge's comment that he would consider the evidence from the first trial during the second trial also showed bias, for such a procedure would be in violation of the Court's order, in its opinion on the first appeal (365 F. 2d 145 (C.A. 7th, 1966) See Appendix 2), that defendants receive a trial *de novo*.

The record before the Court of Appeals in this appeal did not contain the transcript of testimony or exhibits presented in the first trial.(*)

The record in the first trial, which the Court of Appeals reviewed showed that the cause began on November 2, 1962, when plaintiffs charged in a five count complaint, that the defendants by making and distributing records by the artists, had knowingly infringed on plaintiffs' exclusive advantageous contractual relationships for their

(*) Certain evidence presented in the first trial was received in evidence in the second trial. The testimony of the Reverend Robert Ballinger who was deceased at the time of the second trial was admitted. Testimony of Lawrence Abram and Dorothy Abram was admitted to impeach them. Most of the exhibits in the first trial were used in the second trial. All were admitted under appropriate rules of evidence.

exclusive services as recording artists with a gospel vocal group known as the "Original Five Blind Boys of Mississippi—Jackson Harmoneers," under a contract entered into on or about October 5, 1960, at Houston, Texas, continuing a long, similar contractual relationship between the parties; and with a minister, Reverend Robert Ballinger, under a similar contract entered into on or about July 5, 1959, at the same place. The complaint also charged interference by the defendants with certain exclusive music publishing contracts owned by the plaintiffs. In addition, the complaint charged a conspiracy among defendants to interfere with plaintiffs' rights to these exclusive recording contracts and others. Plaintiffs asked damages in the total amount of $450,000. In accordance with F.R.C.P., copies of all contracts relied on were attached to the complaint.

On December 18, 1962, defendants filed an answer denying substantially all of the material allegations of the complaint, and a counterclaim asserting that defendants had an exclusive recording contract with the Five Blind Boys entered into on or about December 22, 1960, at Chicago, Illinois, and that plaintiffs had interfered with it. Plaintiffs answered the counterclaim denying its allegations.

Thereafter, on April 4, 1963, pursuant to leave of court first had and obtained, over the objections of plaintiffs, the corporate defendants filed an amended counterclaim charging that plaintiffs had interfered with defendants' exclusive advantageous contractual arrangements with The Five Blind Boys for their services as recording artists by fraudulently inducing them to breach their contract with defendants, and that plaintiffs had con-

spired with them to commit perjury and maliciously file this suit based upon false and manufactured evidence. By an answer filed in apt time plaintiffs denied the allegations of this amended counterclaim.

On December 17, 1963, just prior to the conclusion of the trial, over the objection of plaintiffs, the defendants were granted leave of court to further amend the amended counterclaim by adding the individual defendants, Leonard and Phil Chess, as counter-claimants. The defendants asked damages in their twice amended counterclaim aggregating $1,500,000. On December 24, 1963, with leave of court, the plaintiffs filed an answer to the further amended counterclaim denying its allegations and alleging that its charges were baseless and unfounded, that the defendants knew it, and that the charges of the amended counterclaim were made for the purpose of harming and damaging plaintiffs and misleading the court as to the merits of plaintiffs' complaint. Plaintiffs, on those grounds, sought additional damages of $150,000.

The first trial in the cause, without a jury, began on September 24, 1963. By direction of the court the defendants were permitted to proceed at the outset with proof in support of the amended counterclaim. They called fourteen witnesses. Among them were the individual plaintiff, called as an adverse witness, and the individual defendants, including Leonard Chess whose affidavit was offered in support of the motion to amend the counterclaim. Also included among the witnesses called by defendants were Loyd Woodard and Lawrence Abram, both of whose affidavits were offered in support of the motion under Rule 60(b). That motion was the subject of the affidavit in support of the motion to recuse pursuant to section 144 filed prior to the second trial which

the court found legally sufficient in the appeal from the judgment entered in the second trial. Upon it appearing that Mr. Abram had made conflicting pretrial statements under oath, one after he had been drinking heavily, the court directed that Abram be considered a court's witness in order that both sides could cross examine him, which they did.

Plaintiffs called twenty-four witnesses and tendered the deposition of another, to support plaintiffs' denial of the charges contained in the amended counterclaim and to prove the allegations of the complaint. Among these were the individual plaintiff and Loyd Woodard and J. T. Clinkscales, the remaining person whose affidavit was offered in support of defendants' motion under Rule 60(b). Included among the witnesses called by plaintiffs there was also Mrs. Lawrence Abram. Though her affidavit was not offered in support of the 60(b) motion, she was tendered to the court on the hearing on the motion as a witness for defendants.

Consideration of the evidence as to defendants' amended counterclaim consumed nineteen court days between September 24, 1963, and October 30, 1963.

On November 4, 1963, after defendants had rested as to their counterclaim, the court allowed plaintiffs to begin to present evidence in support of the counts of the original complaint not controverted by the amended counterclaim; that is, those counts not involving the contracts with the Five Blind Boys. Plaintiffs presented six witnesses in support of those allegations and the defendants tendered three witnesses in support of their answer to those parts of the original complaint. Among these witnesses was the individual defendant, Leonard Chess, who

thus testified for the third time. Four court days were devoted to hearing these witnesses.

Thereafter, the court heard arguments of counsel for two days, permitting counsel for defendants to open.

Subsequently, defendants presented four witnesses in support of their claim for damages, including one of its then counsel and one of its present counsel in this Court. The plaintiffs also presented four witnesses with respect to damages claimed by them, including one of their counsel. The proceedings before the court on damages covered an additional five court days.

Thus the district court in the first trial devoted thirty days to the trial of this cause over a period of four consecutive calendar months, and heard approximately fifty witnesses, some more than once. In addition, the court considered approximately one hundred forty exhibits tendered by plaintiffs and more than seventy exhibits tendered by defendants.

Among these exhibits there were pre-trial statements, under oath, by each of Woodard and Clinkscales taken *ex parte*, by counsel for plaintiffs. In addition, filed with the court, there was a lengthy deposition of each of these witnesses and of Lawrence Abram taken by plaintiffs in accordance with F.R.C.P. The exhibits also included two pre-trial statements, under oath, by Lawrence Abram. One of these statements was taken in the same manner as those of Woodard and Clinkscales. The other had been taken *ex parte* thereafter by counsel for defendants but prior to the taking of Abram's deposition.

Woodard, Clinkscales, and Abram, who are blind, all testified on the trial in corroboration of the testimony

of the individual plaintiff and three other eyewitnesses that the singers had executed the contract with them relied on by plaintiffs at the time and place and under the circumstances alleged in the complaint. Their pretrial statements and depositions were to the same effect except for the statement of Abram taken by counsel for defendants. In his testimony on the first trial, as in his deposition, Abram repudiated that statement and both he and Mrs. Abram testified that he had been drinking heavily when he made it and that he was paid by defendants to make that false statement.

One of the other members of the singing group, Broadnax, who is sighted, also testified that the contract was executed as alleged in the complaint. He, like Abram, had made a contrary *ex parte* statement under oath at the instigation of counsel for defendants. Both that statement by Broadnax, and a prior one taken by counsel for plaintiffs to the same effect as his testimony, were exhibits at the trial. Broadnax, also like Abram, repudiated the statement he had made for defendants' counsel and testified that one of the individual defendants, Phil Chess, had paid him $700 to make the statement and told him what to say, and that later, at the urging of his family, he, Broadnax, had returned the money to the Chess'. On the trial Phil Chess admitted that payment and the return of the money. In the motion for leave to file the amended counterclaim, however, on April 4, 1963, defendants asserted that the individual plaintiff, Don Robey, had given the money to Broadnax to send to the Chess' to discredit them.

On the first trial Mrs. Abram testified at length as to the financial and other offers made to her by Leonard

Chess, Rosco Robinson, one of the sighted members of the singing group, and one of counsel for defendants to get her to induce her husband, on his deposition, to testify in support of the contentions of defendants. Among the inducements was a recording contract, in evidence, between Mrs. Abram, who had no professional singing experience, and a recording company owned by the Chess' which was not in production. Leonard Chess admitted signing that contract along with Mrs. Abram the night before counsel for defendants took her husband's deposition. That counsel never denied.

The remaining member of the singing group, Rosco Robinson, was called as a witness by defendants. Of the fourteen witnesses called by them he was the only one who testified in support of the allegations of their amended counterclaim. On cross examination, however, he admitted making a contrary pre-trial statement under oath which was in evidence. Other substantial discrepancies in his testimony were developed on cross examination. In addition, Robinson admitted that Leonard Chess had hired him to get the other members of the group to support his contentions. Leonard Chess admitted paying Robinson substantial sums as to which both claimed to have no record. All of the other members of the singing group and other witnesses testified to Robinson's efforts to procure testimony favorable to defendants. This evidence was not challenged.

In an effort to show that the singing group was not in Houston, Texas, on October 5, 1960, when their contract with plaintiffs was executed, defendants put in evidence what were claimed to be records of a small hotel in Savannah, Georgia, purporting to show that the group was there at that time filling a singing engagement.

Cross examination of defendants' witnesses and testimony of witnesses called by plaintiffs made it clear that these hotel "records" had been altered and some had been made after the start of this case. In contrast, plaintiffs introduced Houston hotel records whose authenticity was not shaken, of the presence there of the group at the time the contract was executed and evidence that they filled professional engagements in that area at that time.

Most of the foregoing evidence outlined above, as presented in the first trial was also presented during the second trial of this cause, except that Loyd Woodard, J. T. Clinkscales, Lawrence Abram and Dorothy Abram testified on behalf of the defendants. There was substantial additional evidence presented in the second trial to support defendants' or plaintiffs' position.

Defendants appealed from the verdict for plaintiffs in the first trial and while the appeal was pending filed in the Court of Appeals a motion to remand. The Court denied the motion and stated that the district court should advise it whether it would grant defendants' motion pursuant to Rule 60b F.C.C.P. Defendants, with leave of the district court, then filed a Rule 60b motion supported by the affidavits of Leonard Chess, Loyd Woodard, J. T. Clinkscales and Lawrence Abram alleging fraud. The district court advised the Court of Appeals that it would not grant a new trial on the basis of the evidence presented with the motion and the testimony of the affiants heard on the hearing before the Court. The district court stated that in making this decision it also considered the evidence presented in the first trial wherein the question of fraud was litigated under defendants' amended counterclaim.

The Court of Appeals, in its decision reported at 365 F. 2d 145 (C.A. 7th, 1966) contained in Appendix 2 hereto attached, stated that oral testimony should have been taken from the affiants at the 60b hearing. It further stated that it considered that the affidavits and testimony which were presented were sufficient to show fraud and to require a new trial, and that the judge had abused his discretion by not granting a new trial.

Plaintiffs petitioned this Court for a writ of certiorari to issue to review that decision, but the petition was denied (*Peacock Records, Inc.* v. *Checker Records, Inc.*, 385 U.S. 1003, 87 S. Ct. 707).

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States must grant this petition for Writ of Certiorari, for the Seventh Circuit Court of Appeals has so far departed from the usual course of judicial proceedings on two occasions that it has denied plaintiffs their right to a trial by the trial judge, a right guaranteed by the fundamental requirements of due process of law, and has denied plaintiffs who are black equal protection of the law.

Since the beginning of the litigation of this case the Court of Appeals has twice usurped the function of the trial judge by improperly substituting its opinion for that of the trial judge with respect to the credibility of witnesses and the inferences to be drawn from the evidence in a long, complicated trial. The limitation on appellate review of the trial judge's decisions on issues of credibility and fact has long been recognized by this Court and embodied in Rule 52a of the Federal Rules of Civil Procedure. The Rule provides that:

> "• • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. • • •"

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 1576 (1969), this Court construed this limitation on appellate review:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is

circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence (it) is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)." (Other citations omitted)

Also see *United States* v. *Oregon Medical Society*, 343 U.S. 326, 332, 72 S. Ct. 690, 695 (1952) dealing with the trial judge's findings as to the credibility of witnesses. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341, 70 S. Ct. 177, 179 (1949); *Lavender* v. *Kurn*, 327 U.S. 645, 652-653, 66 S. Ct. 740, 744 (1946).

The Court of Appeals has ignored this limitation on the extent of its review by refusing to consider the merits of this case. It has twice remanded the case for a new trial after reversing the trial judge on narrow grounds. In the first appeal the Court improperly limited the trial judge's discretion in dealing with a 60b motion, and in the second appeal it used an improper reviewing procedure to hold legally sufficient an affidavit in support of the section 144 motion filed prior to the second trial. In both instances the rulings were based on the Court's opinion of the credibility of Loyd Woodard, J. T. Clinkscales and Lawrence Abram.

A. The Rule 60b Motion

The disposition of the appeal from the judgment in the first trial and the order of the trial judge advising the Court it would not grant a new trial under Rule 60b

F.R.C.P., must be considered by this Court at this time because it is referred to in the section 144 motion which the trial judge denied, the Court of Appeals reversed, as to which plaintiffs now petition this Court for a Writ of Certiorari.

Since the trial judge's order disposing of the 60b motion is crucial here, we set it out in *haec verba*:

> "This matter came on for hearing on a petition by the defendants under Rule 60(b) of the Federal Rules of Civil Procedure supported by affidavits of Leonard Chess, Loyd Woodard, J. T. Clinkscales and Lawrence Abram and a reply thereto by the plaintiffs. In substance those affidavits, taken *ex parte* by one of the defendants and their counsel, are to the effect that the contract relied on by plaintiffs in this cause was not made prior to that relied on by defendants, that affiants, except Chess, testified falsely on the trial to the contrary because they had conspired with Robey so to do.
>
> This cause is now pending on appeal in the Court of Appeals for the Seventh Circuit from a judgment entered by this Court on or about September 21, 1964, in favor of the plaintiffs and against the defendants. Defendants filed a motion to remand the cause to this Court in the Court of Appeals on or about the 7th day of May, 1965, supported by the same affidavits. That motion was denied by the Court of Appeals by an order dated the 16th day of June, 1965, in which that Court outlined the proper procedure as being the filing of a petition under Rule 60(b) in this Court and that Court observed that if this Court indicated that it would grant the motion the Court of Appeals should then be requested to remand the cause.
>
> This Court conducted hearings on the defendant's petition on August 10 and August 17, 1965. At the

hearing on August 17 the defendants tendered to the Court as witnesses Loyd Woodard, J. T. Clinkscales, Lawrence Abram and his wife, Dorothy Abram. Each of these persons had testified before this Court during the course of the trial of this cause. Lawrence Abram had been called as a Court's witness because of his prior inconsistent statements and the other three were called as witnesses by the plaintiffs and had been cross examined at length by counsel for the defendants. Woodard and Abram were also called by defendants.

On motion of counsel for the plaintiffs and it appearing that none of these persons had sufficient funds to employ counsel, this Court appointed counsel to advise each of these witnesses as to his constitutional right to refuse to testify with respect to any questions which might incriminate him and to advise each of them of the pains and penalties of perjury and contempt of court. Each affiant indicated his willingness to testify. On objection of counsel for defendants this Court refused to hear further testimony by affiants.

This Court has considered the petition of the defendants and the reply thereto, the affidavits filed in support of the petition, the testimony of these affiants on the trial and their pre-trial sworn statements and depositions, the conduct, demeanor and credibility of all of the witnesses on the trial, the testimony of other witnesses including the defendants, the other evidence adduced on the trial, and the arguments of counsel for plaintiffs and defendants on the hearing of this petition. On the basis of all of this, this Court is of the opinion and finds:

1. Defendants by their petition seek only to raise again an issue which was raised by their counterclaim and which was heard and decided against them on the trial.

2. The decision of this Court on the trial was not based on the testimony of the affiants alone which, in the main was corroborative, but rather was based on all of the evidence and this Court's judgment as to the credibility of each of the witnesses.

3. It is inherently incredible that these affiants, three of whom are blind, voluntarily offered to admit that they committed perjury on the trial of this cause, particularly in light of the admission by defendants that they paid money to another witness in this cause, Wilmer Broadnax, to make a false pre-trial sworn statement, and the evidence that they had also paid Abram to make a false pre-trial sworn statement.

4. The affidavits of Lawrence and Dorothy Abram were taken by defendants' counsel on March 24 and 25, 1964, while post-trial motions were pending in this Court but were not brought to the attention of any court until after the affidavits of Woodard and Clinkscales had been secured more than a year later because, admittedly, counsel for defendants did not regard the affidavits of the Abrams as sufficient to warrant this Court in vacating its judgment.

5. There is no showing or offer of any showing sufficient under Rule 60(b) to warrant this Court in vacating the judgment heretofore entered in this cause.

6. Accordingly the Court of Appeals should be advised by this Court that it would not grant the petition under Rule 60(b) if the cause were remanded.

7. The Department of Justice should be, and it has been, requested to investigate this matter to determine whether any criminal or contempt proceedings should be brought against any person or persons in connection therewith.

It Is Therefore Ordered that the Court of Appeals for the Seventh Circuit be advised by the Clerk of

this Court of the findings and view of this Court with respect to the petition of defendants, and the Court certifies to the Court of Appeals that it would not grant the motion to reopen this cause even if it had jurisdiction so to do."

The Court of Appeals' decision reversing the foregoing order entered on the Rule 60b motion was based on its opinion that the affidavits of Loyd Woodard, J. T. Clinkscales and Lawrence Abram were sufficient to require the judge to grant a new trial on the ground that a fraud was perpetrated on the Court (See Appendix 2). The effect of this decision, as defendants stated in their affidavit attached to their motion to recuse, was to hold that these three witnesses were telling the truth. The Court thereby substituted its opinion of the credibility of these witnesses for that of the trial judge who had seen and heard these witnesses testify extensively in the first trial, and had heard others testify about them in the first trial.

This substitution of opinion by the Court exceeded the scope of appellate review as limited by Rule 52a F.R.C.P., with respect to the due regard to be given the trial court's opportunity to judge the credibility of witnesses. It also improperly limited the discretion of the trial judge who had not abused his discretion in dealing with this 60b motion. This improper limitation of discretion has caused the endless litigation which is now apparent since defendants and the Court of Appeals have used the decision to support the allegations of bias and prejudice of the trial judge contained in the section 144 motion filed prior to the second trial.

This Court has not considered the scope of discretion in the trial judge in deciding a 60b motion. Plaintiffs' petition for a writ of certiorari requesting review of the

Court of Appeals decision above, which limited his discretion, was denied (385 U.S. 1003, 87 S. Ct. 707). The importance of the trial judge's discretion in deciding a Rule 60b motion has been recognized in the lower courts.

The extent of discretion in the trial judge was discussed in *Atchison, Topeka & Santa Fe Railway Co.* v. *Barrett*, 246 F. 2d 846 (1957), wherein the United States Court of Appeals for the Ninth Circuit denied a motion to vacate and set aside a judgment pursuant to Rule 60(b) although the petitioner alleged that the judgment had been obtained by fraud, misrepresentation and other misconduct. On appeal the United States Court of Appeals for the Ninth Circuit stated that judgments obtained through fraud, misrepresentaation and other misconduct should be vacated pursuant to Rule 60(b) and that the rule should be construed liberally.

Notwithstanding those general principles, it further stated that while the effect of perjury, which has influenced the court, will not be weighed on a motion to set aside the judgment, it then stated at pp. 849 and 850 that:

> "(5, 6) Such a motion for relief is directed to the sound discretion of the trial court, and particularly to the discretion of the trial judge who 'presided in the litigation in which the judgment (now alleged as fraudulent) was entered.' *Independence Lead Mines* v. *Kingsbury*, 9 Cir., 175 F. 2d 983, 988. Discretion is peculiarly and properly left in the trial court in matters of this kind. Not only must there be clear and convincing evidence of fraud, but it must be such as prevented the losing party from fully and fairly presenting his case or defense. *Independence Lead Mines* v. *Kingsbury, supra*, at page 988; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 421, 43 S. Ct. 458, 67 L. Ed. 719. The trial judge saw and

heard the plaintiff; saw his twitchings, what they were and what they were not, as did the jury. He saw or heard the other matters relied on by appellant; he felt the 'climate' of the trial. The trial judge found no fraud nor misrepresentation. (Tr. p. 180) The Court of Appeals should not and will not substitute its judgment for that of the trial court, nor reverse the lower court's determination save for an abuse of discretion. 3 Barron & Holtzoff, Fed. Prac. & Procedure, p. 253; *Cole* v. *Fairview Develop.*, 9 Cir., 1955, 226 F. 2d 175; *Stafford* v. *Russell*, 9 Cir., 220 F. 2d 853; *Parker* v. *Checker Taxi Co., supra*, 238 F. 2d at page 243; *Jones* v. *Jones*, 7 Cir., 1954, 217 F. 2d 239; *Independent Lead* v. *Kingsbury, supra.*

"(7) Our research fails to disclose a single case in this Circuit where this Court has reversed a trial judge on a matter of this kind. We should not commence innovation on the factual basis of this case."

In the appeal from the trial court's order advising the Court it would not grant a 60b motion, 365 F. 2d 145 (1966), the United States Court of Appeals for the Seventh Circuit ruled that the testimony and "climate" of the trial could not have determined whether the witnesses perjured themselves without hearing oral testimony in support of the motion under Rule 60(b).

At this point, it must be remembered that the witnesses who sought to testify on the 60b motion had testified in the first trial about offers that had been made to induce them to perjure themselves and one of the individual defendants had admitted paying $700 to a witness for a false, sworn, *ex parte* pre-trial statement. It is implicit in the findings that the judge considered it quite possible that the offers had now been accepted, for he ruled:

"3. It is inherently incredible that these affiants, three of whom are blind, voluntarily offered to admit that they committed perjury on the trial of this cause. * * *"

Thus, the Judge clearly indicated his determination of the credibility of the witnesses testimony on trial.

He further clarified his position when he ruled:

"The decision of this Court on the trial was not based on the testimony of the affiants alone which, in the main was corroborative, but rather was based on all of the evidence and this Court's judgment as to the credibility of each of the witnesses."

In spite of this, on appeal, the Court stated:

"The effect of this order (denying the motion), if permitted to stand, is to avoid a specific, direct judicial inquiry and determination as to the truth of the sworn statements."

It then found that the trial court abused its discretion because it did not hear further testimony of affiants, whose credibility the trial judge had clearly established in his own mind. It is obvious that the trial judge's conduct was not an abuse of his discretion within the bounds set down and enforced by the Ninth Circuit. He had determined whether the witnesses had perjured themselves and "such motion for relief is directed to (his) sound discretion." Yet this was not sufficient in the Seventh Circuit.

We submitted to this Court's consideration in our prior petition for certiorari that a district judge would have to listen to affiants on a motion under Rule 60(b) if the case is brought in the Seventh Circuit, but need not do so if the case is brought in the Ninth Circuit. We sug-

gested that this conflict in decisions could only be resolved by this Court. As stated before our petition was denied.

We further stated that the decision of the Court of Appeals severely limited the district court judge in the exercise of his discretion. Rule 60(b) F.R.C.P. provides that:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; • • •"

Accordingly, the district court ordered:

> "This Court conducted hearings on the defendants' petition on August 10th and August 17, 1965. At the hearing on August 17 the defendants tendered to the Court as witnesses Loyd Woodard, J. T. Clinkscales, Lawrence Abram and his wife, Dorothy Abram. Each of these persons had testified before this Court during the course of the trial in this cause. Lawrence Abram had been called as a Court's witness because of his prior inconsistent statements and the other three were called as witnesses by the plaintiffs and had been cross examined at length by counsel for the defendants. Woodard and Abram were also called by defendants.
>
> "On motion of counsel for the plaintiffs and it appearing that none of these persons had sufficient funds to employ counsel, this Court appointed counsel to advise each of these witnesses as to his constitutional right to refuse to testify with respect to any questions which might incriminate him and to advise each of them of the pains and penalties of

perjury and contempt of court. Each affiant indicated his willingness to testify. On objection of counsel for defendants this Court refused to hear further testimony by affiants.

"This Court has considered the petition of the defendants and the reply thereto, the affidavits filed in support of the petition, the testimony of these affiants on the trial and their pre-trial sworn statements and depositions, the conduct, demeanor and credibility of all of the witnesses on the trial, the testimony of other witnesses including the defendants, the other evidence adduced on the trial, and the arguments of counsel for plaintiffs and defendants on the hearing of this petition. On the basis of all of this, this Court is of the opinion and finds:"

• • • • •

Rule 43(e) F.R.C.P. supports the foregoing statement. It makes it clear that the right to present oral testimony pursuant to a motion is a matter of discretion for the district court. The rule provides:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

In *Cuthill* v. *Ortmann-Miller Machine Co.*, 249 F. 2d 43, 47 (C.A. 7th, 1957), appellant sought to intervene, after judgment, in an action against a corporation in which he was a substantial stockholder. He alleged that the judgment had been obtained by fraud and filed a motion to have the judgment set aside under Rule 60(b). The Appellate Court affirmed the trial court's decision and stated:

"It was the duty of the trial court to weigh the evidence and determine the credibility of the witnesses."

In the first trial defendants had many days in court. They raised, and the district court passed on at the trial, exactly the issue raised on the motion under Rule 60(b). The only difference is that after judgment against them, defendants charged that a fraud was perpetrated on the trial court because four witnesses made *ex parte* statements inconsistent in part with their testimony at the trial. One of these witnesses did the same thing before the trial. But the testimony of these witnesses was only a small part of the evidence taken and considered by the district court on the trial and it so found. Most impotrant, the district court refused to find that its judgment was induced by fraud.

Of significance in reviewing the procedure here is the fact that after remand, on the hearing of the motion in the *Cuthill* case, *supra*, just as in this case, the district court considered the pre-judgment proceedings. Appropriately, this Court likewise considered those pre-judgment proceedings on review of the district court's action and affirmed it.

The Court of Appeals after stating the judge should have heard oral testimony then reversed the judge's finding on the Rule 60b motion and remanded the entire case for a complete new trial holding that the trial judge had abused his discretion in denying it. The defendants then filed a motion to recuse pursuant to section 144, and in defendant, Leonard Chess, affidavit, used the decision to support their allegation of bias and prejudice.

> ". . . The effect of the Court of Appeals' order in this respect thus established that defendants had successfully shown that the judgment on the merits had been fraudulently procured by perjury and subornation of same, all as reflected in defendants' Rule 60(b) motion. . . ."

B. The Section 144 Motion

In an extraordinary departure from the usual and customary judicial proceedings the Court of Appeals in reviewing the denial of the section 144 motion considered the record in the first trial, which was not before it. On the basis of that record it decided that in its opinion there was no evidence in that record to support the judge's statements at the 60b hearing, contained in the affidavit, that Loyd Woodard, J. T. Clinkscales and Lawrence Abram were lying and had been induced to lie. The Court of Appeals thereby substituted its opinion of the credibility of witnesses for that of the trial judge in the same manner and on the same subject matter involved when it reversed the trial judge's order denying the 60b motion heretofore discussed. This method of reviewing the trial judge's denial of the section 144 motion violated the procedures for reviewing the disposition of such a motion, and resulted in a second review of the evidence in the first trial without the limits on the scope of appellate review of the facts and the credibility of witnesses as contemplated by rule 52a F.R.C.P. set out at page 14.

This Court has formulated a procedure for considering a motion under section 144, Title 28 of the United States Code to guide the lower courts in deciding whether to grant or deny the motion. The first time this Court discussed the section was in *Berger* v. *United States*, 255 U.S. 22, 33-34, 41 S. Ct. 230, 233 (1921).(*) This Court stated that the facts in the affidavit are to be taken as true and that only the matters contained in the affidavit

(*) At that time the section was called Section 21 of the Judicial Code.

are to be considered. With respect to the sufficiency of the facts alleged this Court generally stated:

> "But it is said that there is modification of the absolutism of the quoted declaration in the succeeding provision that the 'affidavit shall state the facts and reasons for the belief' of the existence of the bias or prejudice. • • • It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits. Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

The most important part of the foregoing quote is the determination of the kind of facts which will give *fair* support to the charge of bias. This Court has held that the fact that a judge has made a ruling adverse to the movant is not grounds for a charge that the judge is biased against the movant. In *United States* v. *Grinnell*, 384 U.S. 563, 583, 86 S. Ct. 1698, 1710 (1966), this Court stated:

> "The alleged bias and prejudice to be disqualifying must stem from a extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *Berger* v. *United States*, 255 U.S. 22, 31, 41 S. Ct. 230, 232, 65 L. Ed. 481. Any adverse attitudes that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for."

Also see *Tucker* v. *Kerner*, 186 F. 2d 79, 84-85 (C.A. 7th, 1950).

Throughout the comments of the judge contained in the section 144 affidavit, the judge stated that his opinions, which were certainly statements of adverse attitudes, were based on all the evidence in the first trial including that which he had heard from these witnesses, Loyd Woodard, J. T. Clinkscales, and Lawrence Abram, and the testimony of these witnesses given at the 60b hearing. The record before Judge Wyzanski in *United States* v. *Grinnell (supra)* which the judge said supported his adverse statements during the pretrial conferences on the case, was not reviewed by this Court.

The Court of Appeals ignored the foregoing procedures in reviewing the legal sufficiency of the allegations in defendant's section 144 affidavit and improperly reviewed the evidence in the record of the first trial and decided that the evidence therein did not support the trial judge's expressed attitudes concerning the credibility of Loyd Woodard, J. T. Clinkscales and Lawrence Abram and the inferences from all the facts in the case. The Court in this fashion rendered a decision based on its substituted evaluation of the credibility of these three witnesses without due regard for the limitations on appellate review of the credibility of the witnesses as required by Rule 52a F.R.C.P. Furthermore, its decision was based on a record which was not before it.

The Court of Appeals' finding on the second appeal that the judge's statement that he would consider evidence heard in the first trial was legally sufficient to show bias and prejudice, reads an intent into that statement which is not present and avoids again a review of

the merits of this case. Leonard Chess in his affidavit concluded that the judge's comment meant that he would "view that evidence as if it were offered and received on the new trial." In fact, certain of that evidence was offered in the new trial where necessary and admitted pursuant to the appropriate rules of evidence.(*) Such a comment by the judge does not mean, without further evidence, that the parties would not receive a trial *de novo* on the retrial of the case before him.

C. Summary

The Court of Appeals in considering the two appeals in this case has twice usurped the trial judge's function of determining the credibility of witnesses. It has twice decided the question of the credibility of Loyd Woodard, J. T. Clinkscales and Lawrence Abram by determining in the first appeal that the three witnesses were telling the truth in their affidavits in support of the motion pursuant to Rule 60b, and by deciding in the second appeal that the record in the *first* trial did not support the judge's conclusions in the Rule 60b hearing that these same three witnesses could not be believed and that their testimony and affidavits were not voluntary. On neither occasion did it conform to the limitations on appellate review contained in Rule 52a which requires that a trial judge's findings be clearly erroneous with respect to the entire record before they can be reversed.

(*) For example, the testimony of the Rev. Robert Ballenger who died prior to the second trial was admitted, and the testimony from the prior trial of Lawrence Abram was admitted to impeach him.

The result of these decisions by the Court of Appeals has been the endless litigation of this case, for plaintiffs now must prove their case a third time without ever having had a review of the merits of the past two trials in accordance with the Rules of Federal Civil Procedure. The denial of a trial by a trial judge effected by the Court of Appeals' reversals of the trial judge in the fashion outlined above has violated plaintiffs' rights to due process of law and the equal protection of the laws for plaintiffs herein are Negro and the defendants are white.

CONCLUSION

We submit that the Seventh Circuit Court of Appeals' decision that the affidavit in support of the section 144 motion was legally sufficient contravenes all precedent for reviewing such a motion and is a departure from the accepted and usual course of proceedings which negates the time and effort by a trial judge on two occasions to determine the credibility of witnesses he has heard.

If the decision of the Court of Appeals is not reversed this case will continue to be litigated without end.

For the above and foregoing reasons, the petitioner prays that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM R. MING, JR.
SOPHIA H. HALL.
Attorneys for Petitioners

(Appendix 1) 430 F.2d 85

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 17757

PEACOCK RECORDS, INC., a Texas corporation, and DON D. ROBEY,
Plaintiffs-Appellees,

v.

CHECKER RECORDS, INC., an Illinois corporation, CHESS RECORD CORPORATION, an Illinois corporation, and PHIL CHESS and LEONARD CHESS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

August 6, 1970

Before SWYGERT, *Chief Judge*, and CUMMINGS and KERNER, *Circuit Judges*.

KERNER, *Circuit Judge*. Defendants-appellants Checker Records, Inc. (Checker), Chess Record Corporation, Illinois corporations, and Phil Chess and Leonard Chess, appeal from a judgment arising out of a diversity action in the district court, awarding plaintiffs-appellees, Peacock Records, Inc., (Peacock), a Texas corporation, and Don D. Robey, $350,000 (encompassing compensatory and punitive damages) for tortious contractual interference. We reverse and remand.

(Appendix 1)

Defendant-appellant Checker and plaintiff-appellee Peacock are engaged in the recording, manufacture, and sale of phonograph records throughout the United States. The plaintiffs' complaint in the district court consisted of five counts alleging that:

(I) Defendants entered into a scheme and plan to interfere with plaintiff Peacock's rights under an exclusive contract for the personal services of a vocalist group known as the Five Blind Boys (Blind Boys), executed on October 5, 1960;

(II) A violation by defendants of plaintiffs' contractual rights created on July 5, 1959, to the personal recording services of one Reverend Robert Ballenger;

(III) A conspiracy by defendants to interfere with plaintiff Peacock's contractual rights described in Counts I and II;

(IV) Injunctions should be granted against interference with plaintiffs' contracts by defendants;

(V) Defendants' fraudulent interference with plaintiff Don Robey's contractual relations with composers Loyd Woodard and Roscoe Robinson of October 5, 1960.

Defendant Checker in addition to its answer denying the existence of Peacock's alleged contracts on the dates claimed, filed a two-count counterclaim alleging that plaintiffs interfered with defendants' exclusive recording contract of December 22, 1960, with the Blind Boys and plaintiffs conspired with members of the Blind Boys for the purpose of maliciously prosecuting defendants, including the present law suit.

The cause was originally tried in September of 1963 before the Honorable District Judge J. Sam Perry sitting without a jury. At the conclusion of all the evidence, the trial judge awarded plaintiffs compensatory and punitive damages totalling $250,000, subsequently reduced on defendants' motion to $150,000.

While appeal of that judgment was pending, defendants, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, filed a motion (supported by affidavits and

sworn statements) to vacate the judgment on the grounds that it had been fraudulently obtained by means of perjured testimony suborned by plaintiffs.

The alleged perjured testimony involved the testimony of three members of the Blind Boys, Loyd Woodard, J. T. Clinkscales and Lawrence Abram. These three performers offered testimony at the first bench trial to support plaintiffs' allegation (contained in Counts I, III and V) that the three-year contracts were executed between plaintiff Peacock and the five Blind Boys on October 5, 1960, and that defendants were so advised of this October 5 contract before they contracted with the Blind Boys on December 22, 1960. Subsequent to this testimony, the three Blind Boys in sworn statements declared that their testimony at the first trial was false and perjured. The Blind Boys in the form of sworn statements stated that their contract with Peacock was not in fact executed by them until Spring of 1961, but was predated to October 5, 1960.

The lower court denied defendants Rule 60(b) motion refusing to hear the testimony of the three Blind Boys and from that denial defendants appealed.

This court in *Peacock Records, Inc.* v. *Checker Records, Inc.*, 365 F. 2d 145 (7th Cir. 1966), held that the failure of the trial court to grant the 60(b) motion, in light of the assertion that the judgment was obtained by fraudulent means, *i.e.*, perjured testimony, the submission of affidavits supporting the motion, and the perjuring witnesses' willingness to testify (after being told of their constitutional rights) was a failure "to exercise a sound legal discretion." *Id.* at 148. Consequently, this court reversed and remanded with instructions for a new trial.

On appeal from a $350,000 verdict in favor of plaintiff Peacock in the second trial, the defendant-appellant Checker raises the following allegations of error:

(1) That the trial judge committed reversible error in denying defendants' motion to recuse himself filed pursuant to 28 U.S.C. §144;

(2) That the trial court erred in denying defendants' motion for a directed verdict based on the alleged failure

of plaintiffs to prove essential elements of the tort charged in their complaint;

(3) That the trial court erred in considering at the second trial of this cause evidence offered by plaintiffs only at the first trial;

(4) That a substantial number of the trial court's findings of fact on material matters are clearly erroneous;

(5) That the trial judge committed several errors in his computation of damages.

We find that the trial judge committed reversible error by not granting defendants' motion to recuse himself pursuant to 28 U.S.C. §144 and, therefore, need not reach the other allegations of error raised by defendant-appellant Checker. 28 U.S.C. §144 states in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The defendants' affidavit in support of their Section 144 motion in the instant case contained the following allegations:

(1) That three of the Blind Boys who testified on behalf of the plaintiffs at the first trial that their contract was executed on October 5, 1960, thereafter recanted this testimony and confessed under oath that it was entirely false, perjured and suborned by plaintiff Robey;

(2) That these confessions were in the form of sworn statements which set forth circumstances alleging a conspiracy between plaintiffs and the Blind Boys to support the predating to October 5, 1960, of the contracts between plaintiffs and the Blind Boys, when in fact the contract was not executed until the Spring of 1961;

(3) That when these sworn statements came before the judge pursuant to defendants' 60(b) motion, he de-

clined to hear from these three witnesses who in open court indicated to him their willingness and desire to testify to their perjuries and set out the true facts;

(4) That the refusal of the trial court judge to hear these witnesses was based on his expressed belief that the three Blind Boys' recantations and confessions were false and had been procured by the payment of money to them by defendants;

(5) That defendants at the new trial would call on their behalf these three Blind Boys as witnesses, who would testify as to their perjuries in the first trial in accordance with their statements filed in support of defendants' Rule 60(b) motion and that testimony would go directly to the heart of the issues posed by the pleadings;

(6) That because of the trial judge's preconceived fixed belief in advance of the new trial as to the falsity of the witnesses' confession, he could and would not consider their testimony to be given on defendants' behalf at the second trial;

(7) That the trial judge at the new trial would, however, consider all of the evidence taken at the first trial. Thus, defendants on the new trial would be confronted with the perjured testimony of Woodard, Clinkscales and Abram which would be given weight despite their recantations whereas their testimony to the true facts would be given no weight at all.[1]

For the purpose of a 28 U.S.C. §144 motion, the facts contained in the affidavit for disqualification are to be taken as true, *see e.g., Berger* v. *United States*, 255 U.S. 22 (1921); *Wolfson* v. *Palmieri*, 396 F. 2d 121 (2d Cir. 1968); *Tucker* v. *Kerner*, 186 F. 2d 79, 85 (7th Cir. 1950).

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[1] During the colloquy, on defendants' motion to recuse, their counsel suggested that if the trial court would impanel a jury to hear the issues at the new trial, it would not be necessary to press the matter further since such a jury would determine questions of fact and matters of credibility. The trial judge in ruling on this stated that he would deny a jury trial even if the parties agreed thereto because such a trial could "compel new testimony all the way from start to finish." We need not decide whether the use of a jury at the retrial would have prevented error in this case.

Taking the facts as true, the trial judge then must assess their legal sufficiency:

> To be sufficient an affidavit must show "the objectionable inclination or disposition of the judge"; it must give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." [*Berger* v. *United States*, 255 U.S. at 33-35.] *Rosen* v. *Sugarman*, 357 F. 2d 794, 798 (2d Cir. 1966).

We find the affidavits supporting defendants' motion to recuse to have been legally sufficient and, therefore, hold that the failure to grant such motion was error.

After the judgment was entered in the first trial, the defendants filed a Rule 60(b) motion to vacate the judgment on the basis of the changed testimony of the three Blind Boys. The trial judge denied the motion stating in part that:

> It is inherently incredible that these affiants, three of whom are blind, voluntarily, offered to admit that they committed perjury on the trial of this case particularly in the light of the admission by defendants that they paid money to another witness in this cause, Wilmer Broadnax, to make a false pre-trial sworn statement, and the evidence that they also paid Abram to make a false pre-trial statement.

On appeal from this denial of the 60(b) motion, this court in *Peacock Records, Inc.* v. *Checker Records, Inc.*, *supra*, held that the trial court's failure to grant the motion in the face of the "verified motion, sworn testimony in open court which was unimpeached and which so clearly supported the motion . . . the [trial] court failed to exercise a sound legal discretion." *Id.* at 148. This court consequently issued a mandate ordering that the case be remanded for a new trial. This mandate was controlling upon the district court and required it to hold a "*trial de novo*," *see e.g.*, *Shell Petroleum Corporation* v. *Shore*, 80 F. 2d 785, 786 (1935). Crucial to the determination in a new trial would be the testimony of the three Blind Boys as to the execution date of the contract with Peacock.

While the fact that a trial judge has formed opinions based on the evidence at the first trial, does not disqualify him from hearing the retrial of the case, *see e.g.*, *United States* v. *Bolden*, 355 F. 2d 453, 456 (7th Cir. 1965); *Tucker* v. *Kerner*, 186 F. 2d 79, 84-85 (7th Cir. 1950), such opinions must be based on direct evidence introduced at the first trial and not based on mere speculation unsupported by the record. Findings by a trial judge unsupported by the record are evidence that the judge has relied on extrajudicial sources in making such determinations indicating personal bias and prejudice. *Cf. United States* v. *Grinnell*, 384 U.S. 563, 583 (1966).

We find nothing in the record of the first trial which is supportive of the judge's determination that the recantation of the three Blind Boys was suborned by the defendants and, therefore, perjured. Lawrence Abram's pre-trial deposition was on behalf of plaintiffs, not defendants, and we find the record of the first trial insufficient to support any conclusion that the subsequent recantation of his testimony was suborned perjury by defendants. In addition, the fact that defendants admitted in the first trial that two witnesses were paid to testify for defendants (Roscoe Robinson and James Clay Jackson) and that Wilmer Broadnax was paid to make a pretrial sworn statement does not in any way establish the trial judge's finding that three different witnesses (Abram, Clinkscales and Woodard) were paid by defendants to recant their testimony and admit to having committed perjury in open court even after the court had warned them of their constitutional rights and had appointed counsel for them.

There is a substantial difference between admissions that witnesses were paid to testify for a party, not indicating whether the testimony was true or false, and evidence supporting a finding that witnesses were paid to admit to having committed perjury. We find such admissions by defendants not supportive of the trial judge's finding that the three Blind Boys' recantations were perjury suborned by defendants.

In addition, the trial judge indicated in direct contravention of this court's mandate in *Peacock Records, Inc.* v. *Checker Records, Inc.*, *supra*, that he would consider

anew in the second trial all the evidence he heard at the first trial, consequently including the testimony at the first trial of the three Blind Boys (Abram, Clinkscales and Woodard). The trial judge indicated his intention to consider the testimony introduced at the first trial despite this court's finding in *Peacock Records, Inc. supra*, that the sworn statements by the three Blind Boys was unimpeached and clearly supportive of their declaration that perjury was committed at the first trial and should not have been disregarded by the trial judge.

Consequently, we hold that defendants' affidavit alleging the trial judge's prejudgment, without any basis in the record of the first trial, that the new testimony by the three Blind Boys was suborned perjury and the trial judge's intention to consider all the evidence of the first trial anew in the second trial in direct violation of this court's "de novo" remand in *Peacock Records, Inc., supra*, (thus including the original testimony of the three Blind Boys) indicated "whether consciously or not a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored." *Knapp* v. *Kinsey*, 232 F. 2d 458, 466 (6th Cir. 1956). We find that defendants' allegations contained in their motion to recuse were legally sufficient to require that the trial judge, pursuant to 28 U.S.C. §144, grant defendants' motion.

We therefore reverse and remand with directions that a new judge hear the retrial of this cause.

REVERSED AND REMANDED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3767—The Schaffer Press, Inc., Chicago, Illinois—8-6-70—200

(Appendix 2) 365 F.2d 145
cert. den. 87
S.Ct. 707; 385
U.S. 1003

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 14944, 15382
SEPTEMBER TERM, 1965 — APRIL SESSION, 1966

PEACOCK RECORDS, INC., a Texas corporation, and DON D. ROBEY, a citizen of Texas,
Plaintiffs-Appellees,
vs.
CHECKER RECORDS, INC., an Illinois corporation, CHESS RECORD CORP., an Illinois corporation, and PHIL CHESS and LEONARD CHESS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 26, 1966

Before SCHNACKENBERG, CASTLE and KILEY, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* In a diversity action in the district court, Checker Records, Inc., and Chess Record Corp., Illinois corporations, Phil Chess and Leonard Chess, defendants, appeal from a judgment against them in No. 14944 in favor of Peacock Records, Inc., a Texas corporation, and Don D. Robey, a citizen of Texas, plaintiffs, for $250,000 (later reduced to $150,000). The case was tried without a jury.[1]

[1] Tried first was an amended counterclaim which charged in two counts that plaintiffs interfered with defendants' rights to record a certain group of vocalists, and a conspiracy to manufacture false evidence for the purpose of maliciously prosecuting defendants, including bringing this suit. The court found against defendants on both counts.

(Appendix 2)

Plaintiffs' complaint, which defendants answered, contained five counts. Count I alleged violation by defendants of plaintiffs' contractual relations with the Blind Boys, a group of singers; count II relied on a supposed violation by defendants of plaintiffs' contractual relations with Reverend Ballinger; count III charged conspiracy by defendants to interfere with Peacock's contracts described in counts I and II; count IV prayed for injunctions against interference with its contracts by defendants; by count V, plaintiff Robey sought damages from defendants for their alleged fraudulent interference with Robey's contractual relations with composers Loyd Woodard and Roscoe Robinson.

It has been the contention of plaintiffs that the Blind Boys occupied a pre-eminent position as singers of gospel music and that plaintiffs made substantial advances on royalties to them and spent substantial sums in promotion of sales of their records. Plaintiffs have also contended that there is uncontradicted evidence that defendants tried to buy the rights of plaintiffs to record these and other artists.

There was evidence as to sales by and profits accruing to plaintiffs on sales of records of the Blind Boys, under count I, including the opinion of a business specialist in the gospel music field that the exclusive right to record these singers for a year was worth $20,000 to $25,000.

There was evidence as to the quantum of sales of records made by Reverend Ballinger for plaintiffs under count II and the admission by defendants of royalties on music written by Robinson and Woodard,[1] which were collected by defendants, under count V.

On January 17, 1964, the court entered a judgment in favor of plaintiffs for $250,000 which was reduced on September 21, 1964, as above indicated, to $150,000. Appeal No. 14944 has brought this judgment as amended to this court.

On June 22, 1965 defendants appeared by counsel and moved to vacate the judgment of September 21, 1964, pursuant to rule 60 (b) of the Federal Rules of Civil

[1] They were two of the Blind Boys.

Procedure, on the ground, *inter alia*, that it was obtained by fraudulent practices on the part of plaintiffs, by means of which they procured and suborned perjured testimony at the trial material to the issues and controlling in the result thereof, which motion was accompanied by supporting affidavits of Leonard Chess, a defendant, and Loyd Woodard, J. T. Clinkscales and Lawrence Abram. On July 9, 1965, plaintiffs filed an answer.

On August 10, 1965, a hearing on the motion under rule 60 (b) was begun. Called as witnesses by defendants, on August 17, 1965, were three of the Blind Boys and, by the court, the wife of one of them. The court appointed counsel to advise these witnesses of their rights to refuse to testify and the consequences in case they chose to testify. Thereafter they appeared with court-appointed counsel and stated that they were ready to testify. But the court did not take any further testimony of these witnesses. Instead it stated:

> "• • • the more I go into it, the more serious it becomes as to whether or not I should consider this petition* at all.
>
> • • •
>
> "• • • Now, mysteriously two of the other witnesses just voluntarily come in and want to tell the truth to clear their conscience. It just sounds thin to me, gentlemen. I am going to refuse to consider this petition. I will indicate to the Court of Appeals, first, that I do not think I have jurisdiction; second, if I do have jurisdiction, that I do not think it is the kind of petition based upon the kind of evidence that the Court should reopen a judgment after these many long months, because I think what Mr. Ming has said and having in mind particularly my memory of the testimony of some of the things that the plaintiffs themselves swore to under oath—not the plaintiffs, but rather the defendants Chess swore to in this court, the payment of money that they themselves admitted was made in this hearing—I am just not of the opinion that this case should be reopened and I will advise the Court of Appeals

* Motion under 60 (b)

that in my judgment it should not be opened; that it will furnish just exactly the opportunity that Mr. Ming has pointed out for endless litigation of this type of case.

"These Five Blind Boys have my deepest sympathy. They are the pawns and they are in the middle of this fight.

"As I indicated to you, gentlemen, I am going to continue to ask that this be further investigated to see what has happened in this case. It is very serious. I will indicate to the Court of Appeals that I will not—I had thought I should grant a hearing, but on further consideration, I think it is not a matter that I should grant a hearing in at all. I think the time to dispose of it is here and now. Let the Court of Appeals pass upon this judgment. I will enter a formal order in accordance therewith."

On August 19, 1965 the court entered the order (from which defendants appeal in No. 15382) in which the court set forth as a reason for its finding:

"3. It is inherently incredible that these affiants, three of whom are blind, voluntarily offered to admit that they committed perjury on the trial of this cause, * * *."

and advised us that it would not grant the "petition" under rule 60 (b) if the cause were remanded.

The effect of this order, if permitted to stand, is to avoid a specific, direct judicial inquiry and determination as to the truth of the sworn statements, to which the court refers.

Inferentially the district court concedes that the testimony of these persons at the trial was part of the evidence upon which the judgment under attack was based. We hold that where it appears that perjured testimony may have played some part in influencing the court to render a judgment, the perjury will not be *weighed*, on a motion to set aside the judgment. This seems self-evident. The factual question which the district court failed to answer is, "Was the judgment obtained in part by the use of perjury?" *A. T. & S. F. Ry. Co.* v. *Barrett*,

9 Cir., 246 F.2d 846, 849 (1957). If it was, then it was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice. Thus, in that event, this taint had affected the entire proceeding in the court below, although we find no indication that any counsel herein was a party to any wrongdoing.

Perhaps nothing could be more helpful in emphasizing the correctness of the result we now reach than a reference to *Parker* v. *Checker Taxi Company*, 238 F.2d 241 (1956), now relied on by plaintiffs, where we expressly, at 243, recognized that

> "The inherent right of the court to vacate a judgment for fraud, as stated above, is strengthened by Rule 60 (b), Federal Rules of Civil Procedure, 28 U.S.C.A., which provides that on motion the court may relieve a party from a final judgment or order for fraud, misrepresentation, or other misconduct of an adverse party."

In *Parker*, at 244, we pointed out that

> "The court had nothing before it except the record in the case and the bare petition made on behalf of Field by its attorneys and verified by one of them on information and belief. The record fails to show any additional proof offered by Field prior to or at the time of the hearing."

On the other hand, in the case at bar, the district court had before it, not only the record in the case, but the motion under rule 60 (b), supported by affidavits (which occupy 110 pages of the printed appendix herein), and an indication that witnesses Woodard, Clinkscales, Abram and wife Dorothy, were willing to testify after the court had warned them of their constitutional rights and had appointed counsel for them.

While in *Parker* this court found nothing in the record and the "petition" to justify setting aside the judgment under rule 60 (b) and held that it could not say "from the record before us here" that the district court did not exercise a sound legal discretion when it denied the "petition" under rule 60 (b), in the case at bar the

record affirmatively shows that the district court did have before it, in addition to the verified motion under 60 (b), sworn testimony in open court, which was unimpeached and which so clearly supported the motion that it becomes incumbent upon us to hold that, in denying the motion, the court failed to exercise a sound legal discretion. This action requires that the order from which this appeal (No. 15382) was taken be reversed and that an order be entered by that court granting said motion, and, in No. 14944, vacating the judgment theretofore entered in favor of plaintiffs and against defendants and remanding said cause for a new trial.

In No. 14944 JUDGMENT VACATED AND REMANDED; in No. 15382 ORDER REVERSED AND REMANDED WITH INSTRUCTIONS.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.